purchaser in the shoes and subjects him to the equities (if any) against the assignor thereof: *McJilton* v. *Love*, 13 Ill. 495, and cases cited; *Cook & Sargent* v. *Burtis*, 16 Iowa 194; *Ballinger* v. *Tarbell*, Id. 491; *Crocker* v. *Isett*, 18 Id. Why should a purchase under it have any greater effect?

But the doctrine that the judgment is a nullity should be strictly limited to cases where there has been no service, and where there is a total want of *jurisdiction* in the court, and a *total* want of authority on the part of the attorney to appear. It should not be extended to cases where an attorney, who has been retained or regularly employed, has simply *exceeded* his authority.

J. F. D.

RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

THE STATE OF MARYLAND, TO THE USE OF MARY COUGHLAN, *v.* THE BALTIMORE AND OHIO RAILROAD COMPANY.

THE BALTIMORE AND OHIO RAILROAD COMPANY *v.* THE STATE OF MARYLAND, TO THE USE OF MARY COUGHLAN.

Distinction between Passengers and Strangers.—Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers, than to mere strangers having no fiduciary relations with the company.

Distinction further defined.—In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

Negligence of Plaintiff.—The plaintiff cannot recover for an injury resulting from the negligence of the defendant, if, notwithstanding such negligence, he might have avoided the injury by the exercise of care and prudence on his part, or if his own want of such care and prudence or that of the party injured, in any way contributed directly to the injury.

Damages.—In a case where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feelings is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.

THE Baltimore and Ohio Railroad Company were the owners of a track on Locust Point, in the City of Baltimore, and used a locomotive for the regulation of the trains, picking up empty cars and uniting them to be sent out on the main track. On the occa-

sion in question, a train had been formed in this manner, consisting of many cars, and was being backed at a very slow speed round a curve, on which were houses that prevented the engineman from seeing the back of the train or the end car. Two boys, playing in the neighborhood, who saw the train in motion, ran to get a ride on the last car, catching hold of the bumper and with their feet on the brake bar. A jolt threw one off and he was killed, while the other was badly injured, losing a part of one hand. It was in proof that these boys had again and again been driven from the cars on other occasions, and their parents informed of their conduct. It was admitted that there was no employee of the company on the end car, and that the engineman and conductor did not know of the accident till some time after it happened.

The opinion of the court was delivered by

BOWIE, C. J.—These are cross-appeals in an action instituted under the 1st and 2d sections of Article 65 of the Code, by the state for the use of a widowed mother, whose son was killed under the circumstances detailed in the bill of exceptions.

After evidence was offered by both parties, a series of prayers was submitted by each, all of which were rejected and other instructions given by the court instead thereof.

To which rejection, and the instructions given, the plaintiffs and defendants severally excepted.

The counsel of the defendants having filed in these causes a declaration in writing, that, in the event of an affirmance of the judgment as against the plaintiffs on their appeal in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellants have been aggrieved by the action of the court below.

The General Assembly of this state in the year 1852, finding the common-law maxim, "Personal actions die with the person," unsuited to the circumstances and condition of the people, enacted a law entitled "An act to compensate the families of persons killed by the wrongful act, neglect, or default of another person." To make its design more obvious, the fourth section provides, "the word person shall apply to bodies politic and corporate," and "all corporations shall be responsible, under this act, for the wrongful acts, neglect, or default of all agents employed by them."

The material provisions of this act, as well as its title, are derived from the 9th and 10th Victoria, and are embodied in Art. 65 (tit. *Negligence*) of the code.

The object of the several series of prayers was: 1st. To furnish the jury with a standard of the care and diligence, required by law of the defendants, to exempt them from liability for damages for the injury incurred; 2d. To prescribe the care necessary to be exercised by the deceased to entitle his next of kin to recover; 3d. To define the measure of damages.

The appellant's first prayer required the defendants, under the circumstances therein predicated, "to exercise the *utmost care and diligence* to prevent accidents endangering the life or lives of the people or inhabitants of the said city."

The second held, that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard, or look-out, at the head or in the rear of said cars * * * was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

The appellant's third prayer affirms that the jury, in the estimate of damages, should take into consideration the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense, &c., and that, in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss proved in said case.

The propositions laid down by the court, in the first instruction granted, are:—

That the defendants, in the movement and management of their cars and engines, were bound to exercise the *utmost care and diligence* which it was within their means and power to employ, to prevent accidents, and injuring or endangering the life or lives of the people; and if the jury find that the child of the plaintiff's *cestui que use* was run over and killed by the defendants' cars, as described by the witnesses, and that, if the defendants, in the use and management of their cars and engines, had exercised the *highest degree of care* and diligence "which it was within their means and power to employ," the said accident could have been prevented, then the plaintiff is entitled to recover in the action; but although the jury may find that the said accident could have

been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care, by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of said boy's age and intelligence.

The degree of care and diligence imposed by law on the defendants, in the instruction given by the court, is as high as that required by the appellant's prayers; the degree is the "utmost care and diligence," the "highest it was within their means and power to employ;" the only material difference is, that one of the appellant's prayers asked the court to instruct the jury specifically, "that if the use of a guard or look-out, at the head or in the rear of said cars, was a measure by which such accidents would probably be avoided, the omission was culpable negligence." The general terms used by the court embraced all the particulars specified by the prayer of the appellant, qualified by the words, "it was within their means and power to employ."

The jury were at liberty to find, under the instruction given, and perhaps did find, that the absence of the guard constituted the want of the "highest care and diligence within the means and power of the defendants," and therefore rendered their verdict in favor of the plaintiff.

The liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound "to use the utmost care and diligence which human foresight can use:" *Stockton* v. *Frey*, 4 G. 422–23; *Worthington* v. *Baltimore and Ohio Railroad Co.* (in this court, not yet reported). But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect, or default, "as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof:" Vide Code, art. 65, § 1.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law required towards those with whom there is a relation of trust and confidence, or bailment between the parties. "Towards the one, the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration. Towards the other, he is under no obligation but that of justice and humanity.

While engaged in their lawful business, both are bound to use a degree of caution suited to the exigencies of the case:" 8 Barb. 378.

In an analogous case, this court said: Railroad companies should use "such care and diligence in using the locomotive upon the road, as would be exercised by skilful, prudent, and discreet persons, having the control and management of the engine, regarding their duty to the company, the demands of the public, and the interests of those having property, and having a proper desire to avoid injuring property along the road." This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons: Redfield on Railways 345, 4 Md. 257.

The court's instruction did not close with the definition of the degree of care and diligence on the part of defendants; but proceeded to inform the jury, although the accident could have been prevented by the exercise of such care and diligence by the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of such care by the child as might, under all the circumstances, have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although, by the exercise of extraordinary care on their part, the accident might have been prevented.

This ruling is in conformity with all the text-writers, and the great majority of adjudged cases: Redfield on Railways 337; 2 Car. & R. 730; 8 C. B. 115.

It is objected on the part of the plaintiff below, the appellant in this case, that the court's first instruction was erroneous, in instructing the jury, the action could not be maintained "if the jury believed the accident could have been avoided by the *exercise of that degree of care by the said* child, which was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence." Whereas the court should have told the jury the plaintiffs could not recover, if the jury found "there was a want of that degree of care on the part of the said child which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of the "*want of*," *or absence* of such care, should have been left

to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the court's instructions the proposition is stated affirmatively; in the appellant's objection it is negatively. The jury were to find whether there was or was not due care on the part of the deceased. They are told by the court, "if they believed the accident could have been avoided by the *exercise* of that degree of care," &c., the plaintiff could not recover. The appellant insists that, not the exercise, but the want of care (which is the non-exercise of care), is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries to which his own negligence directly contributed, is admitted, and it seems to us it was clearly expressed by the court in the instruction given, as far as the conduct of the deceased child was concerned. In the case of *The Baltimore and Ohio Railroad Co.* v. *Lamborn*, 12 Md. 261, and *Keech's Case*, 17 Id. 46, the rule of the common law, that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to apply to actions brought on the statutes therein referred to, and the instructions, affirmed by the court in those cases, submitted to the jury the question of negligence on the part of the plaintiff, as well as on the part of the defendant.

The same policy would require the plaintiff to show, in actions for injuries resulting in death, that neither the party injured, nor the parties for whose use the action was brought, had contributed, by neglect or want of care, to the calamity complained of. This omission in the instruction given enured to the advantage of the appellant, and cannot be taken advantage of on her appeal.

The objection raised by the plaintiff to the court's second instruction, involves the measure of damages. In the language of the brief, "it was erroneous, 1st. Because it ignores the mental sufferings of the mother suing for damages sustained by the loss of the child, and confines her claim to pecuniary damages." 2d. Because it limits the pecuniary loss of the mother, the *cestui que use*, "to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain, in her advanced life, for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation."

In the absence of any interpretation of this act by our own courts, we must compare and weigh the reasoning of the authorities cited, in which similar acts have been construed by other tribunals.

First in order are the decisions in England upon the act called Lord Campbell's Act, 1 Redfield 336. The observations of COLERIDGE, J., in the case of *Blake, Adm'r.*, v. *The Midland Rail way*, 10 Eng. L. & E. R. 487, cited by Redfield in his notes, are very strong in support of the instructions given by the court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says: "Our only safe course is to look at the language the legislature has employed. The title of the act is for compensating families of persons, &c., not for solacing their wounded feelings." * * * By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury, resulting from his death, to his family." This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion.

As we have before intimated, the title and language of the Act of Assembly of this state are almost literally the same with those of the English statute.

The former contains, also, the provisions for distributing the damages among the surviving members of the deceased family, on which the learned judge relies for adopting the principle of *compensation* for damages which may be estimated in money.

The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge Redfield, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

It is assumed by the learned author just mentioned, as the conclusion of the best considered cases in this country, that mental anguish, which is the natural result of the injury, may be taken into the estimate of the damages to the party injured.

The connection in which this assumption is made, might lead to the inference that it applied to actions brought by *survivors*, for injuries done to their deceased ancestor, relative, or next of kin

but upon reference to the authorities cited, it will be found that the plaintiffs in those cases were the persons sustaining the bodily harm, and in estimating their damages their mental suffering constituted an element of compensation: 1 Cush. 451; 10 Barb. 623.

To have instructed the jury to allow "what they considered a reasonable compensation," would, in the language of the Supreme Court of Pennsylvania, "be giving the jury discretionary power, without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever:" *Rose* v. *Story*, 1 Barr 190, 197. In the case of the *Pennsylvania Railroad Co.* v. *Kelly*, 7 Casey 372, the same learned court say:

"Generally speaking, the influence of the court, in this class of cases, should be exerted to restrain those excesses into which juries are apt to run. * * * Wild verdicts are frequently rendered. And the tendency, in modern times, undoubtedly is to excessive damages, especially where they are to be assessed against corporations:" Ibid. 379; *The Pennsylvania Railroad Co.* v. *Zebe et ux.*, 33 Penna. 330.

The last objection to the second instruction granted, is that it limits the mother to compensation for loss of her son during his minority only.

To submit to a jury the value of a life, without limit as to years, would have been to leave them to speculate upon its duration without any basis of calculation.

The law entitles the mother to the services of her child, during his minority only (the father being dead); beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving for sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

This court, being of opinion that the several instructions granted by the court below were as favorable to the plaintiff (the appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in

the rulings of the court below, in the first appeal, and will affirm the judgment.

Judgment affirmed.

The first proposition maintained in this case is very obvious upon principle as well as the decided cases. Where such an amount of passenger traffic as is now done by railways is confided to agents operating by means of so powerful and dangerous an element as steam, no state or country could fairly justify any rule of responsibility except that of the utmost practicable watchfulness, skill, and ability. And no doubt these considerations, connected with the nature and extent of the business of railways, will justify a demand that their business shall be so conducted as to give fair and just opportunity for the conduct of other legitimate business, more or less interfering with that of the company, with reasonable security. The rule, as stated in some of the earlier cases, in regard to railways, is that they should be so conducted, with reference to other business interests, that all may have proper scope and reasonable opportunity to escape detriment; the same as if the company owned both interests, and desired the success of both: *Quimby* v. *Vermont Central Railway Co.*, 23 Vt. Rep. 387. This rule, as we have often attempted to show, will apply with great stringency to any business which is more than commonly liable to destroy life or property. Prudent men always measure their care and diligence by the exigencies of the business and the occasion. Hence it was held in an early case in California (*Wilson* v. *Cunningham*, 3 Cal. Rep. 241), that where the track of a railway intersects the thoroughfares of a city the company are bound to exercise extraordinary care not to injure persons in the streets.

Accordingly, in the present case, it is probably true, as suggested by the court, that where a company push a train of cars backwards through the streets of a city, they would be bound to have a servant so stationed that he could look out for persons or property exposed to injury, and who could either himself stop the train or give signal to some one for that purpose in time to prevent collision and damage. But this is not a question of law altogether, and would ordinarily have to be passed upon by the jury. We have discussed this general question of diligence and negligence, both as to the principles involved and the cases bearing upon it, in *Taylor* v. *Briggs*, 28 Vt. Rep. 180, more in detail than would be proper here.

In regard to the effect of general negligence in the party to whom the injury occurs, remotely exposing him to the injury, but forming no part of the proximate cause of the same, the cases are numerous, and at the present day reasonably concurrent in the result, that unless the want of due care on the part of the party injured or of those responsible for the conduct of such party contributed directly to the production of the injury, the other party will be responsible, provided his negligence was the efficient cause of the injury and, with the exercise of proper care, he might have avoided inflicting it, notwithstanding the general want of proper watchfulness by the party injured. The cases are too numerous upon this point to be quoted in detail. *Davies* v. *Mann*, 10 M. & W. 546; *Illidge* v. *Goodwin*, 5 C. & P. 190, are the leading English cases. The American cases will be found, in almost all the states, to have maintained the same view. *Trow* v. *Vermont Central Railway Co.*, 24 Vt. Rep. 487; *Isbell* v. *N. Y. & N. H. R. R. Co*, 27

Conn. Rep. 393; *Kerwhacker* v. *C. C. & C. R. R. Co.*, 3 Ohio (N. S.) 172; *C. C. & C. R. R. Co.* v. *Elliott*, 4 Id. 474. The rule is very broadly stated in *New Haven Steamboat & Transportation Co.* v. *Vanderbilt*, 16 Conn. Rep. 421.

And it seems that the fact that the person or property, as cattle, are trespassing at the time the injury occurs will not subject them to damage without redress, provided there is no such wrong on the part of the person, or of the owner of the property, as to contribute directly to the injury, so that the other party might not, with ordinary care, have avoided it: *Isbell* v. *N. Y. & N. H. R. R. Co.*, *supra*; *Daley* v. *Norwich & Worcester R. R. Co.*, 26 Conn. Rep. 591; *Brown* v. *Lynn*, 31 Penn. St. Rep. 510; *C. C. & C. R. R. Co.* v. *Terry*, 8 Ohio (N. S.) 570.

But where the negligence of the party injured, in any manner or to any extent, contributed directly to the production of the injury, however slightly, there can be no recovery: *Witherly* v. *Regent's Canal Company*, 12 C. B. N. S. 2; s. c. 3 F. & F. 61. So in a very late English case, where the party finding the gates at a crossing negligently closed in the night time, after every exertion to find some servant of the company to open them, necessarily opened the gates himself in order to pursue his journey, and where, without any fault on his part, the gate swung back by its own weight and struck the horse which became unmanageable, whereby the plaintiff was thrown out of the carriage and injured, it was held he could not recover, inasmuch as he had no right to open the gates himself, and the injury was produced by his own wrongful act in doing so: *Wyatt* v. *Great Western Railway Co.*, 11 Jur. (N. S.) 825.

The question of damages is one in regard to which, for a time, the cases seemed to vacillate somewhat, upon the point whether the manner of the infliction of the injury and the shock to the feelings of those near relatives for whose benefit the action was brought, could be taken into the account. It seems very clear that where the suit is for the benefit of the very person sustaining the injury, there could be no question that any shock or injury to his feelings, any mental suffering, which was the direct consequence of the injury, should be considered in estimating damages. Such suffering is a part of the necessary labor to be borne by the party injured, in consequence of the injury: *Canning* v. *Williamstown*, 1 Cush. 451; *Morse* v. *Auburn & Syr. Railway Co.*, 10 Barb 621. But in estimating damages to other parties, affected incidentally by the death of the party injured, it seems now pretty generally conceded, that no account of wounded feelings can be taken. And this, upon the whole, seems but just and reasonable. For there would be no uniformity in cases of this kind if the jury were allowed to go into considerations so remote and uncertain: *Penn. Railway Co.* v. *McCloskey*, 23 Penn. St. Rep. 526, 528, where it is said, "The jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation." And the same rule is followed in *Oakland Railway Co.* v. *Fielding*, 48 Penn. St. Rep. 320. So in *North Penn. Railroad Co.* v. *Robinson*, 44 Penn. St. Rep. 175, it is said, the value of the life lost, estimated by a pecuniary standard, is what is to be recovered.

There is one qualification in regard to the extent to which damages were allowed to be given by the jury in the principal case, which has not generally been adverted to, and which seems to us somewhat liable to misconstruction. We refer to the restriction limiting prospective damages to the minority of the child. It has been decided that a father may re-

cover pecuniary damages for the death of a son twenty-seven years of age, unmarried, and who had been accustomed to make occasional presents to his parents: *Dalton* v. *South Eastern Railway Co.*, 4 C. B. N. S. 296. And it was here held, as it has often been in other cases, that the jury could not give damages by way of compensating the father for the expenses of his son's funeral or for procuring family mourning. So also *Franklin* v. *South Eastern Railway Co.*, 3 H. & N. 211; *Blake* v. *Midland Railway Co.*, 18 Q. B. 93. It was lately held in the Exchequer Chamber (*Pym* v. *Great Northern Railway Co.*, 10 Jur., N. S. 199) that where, in consequence of the death of the father, his income was by direction of his will unequally distributed among his widow and children, the eldest son taking most of it, that damages might be recovered for the benefit of the whole class on that ground, some of the children being thereby deprived of an expected support had the life of the father continued. In the very late English case of *Bonter* v. *Webster*, 13 W. R. 289, the Court of Queen's Bench adhered to the rule that no damages could be awarded to the parent by reason of the death of his child, on account of the expenses of the funeral.

I. F. R.

Court of Common Pleas of New York.

NEW YORK, ALBANY, AND BUFFALO TELEGRAPH COMPANY *v.* DE RUTTE.

Where a telegraph company receives a message addressed to a place beyond its route, and takes the compensation for the entire distance, it engages for the due delivery of the message at its destination, unless it expressly limits its responsibility to its own route, or the circumstances are such as to clearly indicate that such was the understanding of the contracting parties.

The receiver of the message is entitled to sue for his loss by the company's negligence.

The same general principles apply to the liabilities of telegraph companies as to common carriers, but not invariably nor to the same extent. Per DALY, J.

A telegraph company has a right to limit its liability by requiring a message to be repeated, but knowledge of this requirement must be brought home to the sender.

Where a person received a telegram in which there were several errors, all but one of which, however, he interpreted correctly, and that one was not apparent on its face, it is not such negligence in him not to have the message repeated, as will prevent his recovery for loss incurred in consequence of the undiscovered error.

Where a party receiving a telegram erroneously directing him to purchase wheat at 25 francs instead of 22 francs as the message should have been, purchases a quantity of wheat which he is obliged to resell at a lower price, the loss is such a direct result of the negligence as will entitle him to recover.

The Act of 1848 in regard to telegraph companies and messages, is intended as much for the protection of the companies against combinations and monopolies among themselves, as for the public. Per DALY, J.

THIS was an action brought against the appellants, defendants below, for damages for the incorrect transmission of a message sent from New York by their line to the plaintiff in San Francisco.

The facts were as follows:—

The plaintiff below was a commission merchant doing business in San Francisco, California. He had a brother, Theophilus De Rutte, who was his agent and correspondent at Bordeaux in France, but who had otherwise no interest in the plaintiff's business. T. De Rutte procured from Callarden & Labourdette, bankers in Bordeaux, an order for the plaintiff to purchase for them a cargo of wheat in California, at the extreme limit of twenty-two francs the hectolitre, which is the French official measure for grain. The plaintiff was to purchase and ship the grain to Callarden & Labourdette immediately, his commission and the mode of his reimbursement to be the same as in a previous order which he had received from another Bordeaux firm, one of the partners in which was named Monod. Upon receiving the order, Theophilus De Rutte prepared a telegram in these words: "Edward De Rutte, San Francisco, buy for Callarden & Labourdette, bankers, a shipload of five to six hundred tons white wheat, first quality, extreme limit twenty-two francs the hectolitre landed at Bordeaux, same conditions as the Monod contract, TH. DE RUTTE:" and inclosed it in a letter to Jules Lorrimer, a merchant of New York, with instructions to send it to the plaintiff in the quickest manner, and to debit the plaintiff with the charges. A clerk of Lorrimer copied the message upon a slip of paper and took it to the telegraph office of the defendant, where he gave it to a clerk to whom he paid $21.50 for its transmission to San Francisco. The defendants have printed blanks in their office upon which messages are written containing a notice, that to guard against mistakes, every message of importance ought to be repeated, for which half the price will be charged; and that they will not be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise. It did not appear that any such blanks were used in this case, nor was it shown that Lorrimer's clerk or his principal knew of the regulation.

The defendant's line extends from New York to Buffalo, where it connects with other lines, and a pony express to San Francisco

The message was transmitted correctly by the defendant's line, and by the connecting lines to St. Louis, but when delivered to the plaintiff at San Francisco there were several errors. Th. De Rutte was changed to *Thos.* De Rutte, Monod contract to *monied* contract, hectolitre to *pretorlitiere*, and twenty-two to twenty-*five* francs.

The plaintiff was not misled as to three of the alterations. He understood the abbreviation Thos. to mean Theophilus, the words monied contract to mean Monod contract, and pretorlitiere to mean hectolitre. The words twenty-*five* francs, however, he assumed to be correct, but before acting upon the message, he tried, as he said, to get a copy of the despatch from the telegraph company at San Francisco, but they stated that they could not furnish it. Grain could be purchased in San Francisco at that time, at a price which would admit of its being landed at Bordeaux, charges included, at twenty-four to twenty-five francs the hectolitre, but not at twenty-two, and the plaintiff accordingly purchased the requisite quantity, and chartered a vessel for its shipment to Bordeaux, when he received from New York, twenty days after the despatch, the letter which his brother had written, advising him that the extreme limit was twenty-two instead of twenty-five francs. As a further assurance, on receiving this letter, he had the despatch repeated, after which he sold the wheat at the cost price, less commission, storage, and interest, and after several days' effort, he succeeded in getting rid of the charter-party by the payment of $1600 in gold, and he paid the wharfage of the vessel, and the brokerage fees upon the recharter, making in all, with the commissions, storage, and interest, the sum of $2094.51, for which the plaintiff recovered judgment.

From this judgment defendant appealed.

T. H. Rodman, for appellant.

Ed. Randolph Robinson, for appellee.

The opinion of the court was delivered by

DALY, J.—We are asked to reverse this judgment upon several grounds. The first ground taken by the defendant is, that their contract was to transmit the despatch from New York to Buffalo, and deliver it there to the connecting line, which they did. That it is made their duty by Statute Laws of New York for 1848,

page 395, § 11, to receive messages from and for other telegraph lines, and that where they transmit and deliver a message correctly to a connecting line, they are not answerable for errors occurring afterward.

The duty which the statute imposes is as much for the benefit of the telegraph companies as for the individuals who make use of them, for the business of a company, where there are several connecting lines, might be materially diminished if any of them should refuse to deliver messages to or receive them from it, and the object of this provision, therefore, was manifestly to enable new companies to compete with established lines, thus preventing the evils of monopolies, and of combinations among companies. But while the statute makes it the duty of a telegraph company to receive and transmit such messages, it does not make it in such a case the collecting agent of the other lines. It imposes no higher duty than the words express, and leaves each company at liberty to require the payment of its own charges before it either delivers or transmits a message. Where a message is to be transmitted through many connecting lines, it is a matter of convenience to be enabled to pay the entire charge, either at the place from which it is sent, or at the place where it is received; and it is the interest of companies, especially where there are competing lines, to make arrangements whereby upon the payment to them of the whole charge, a message may be sent the entire length of telegraphic communication. It is to be assumed that this is the case, when a telegraphic company was paid for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, and they must in such a case be regarded as undertaking that the message will be transmitted and delivered at that place.

The same rule must be applied to them that is applied to a common carrier, who receives the whole compensation for the carriage of a package addressed to a place beyond the limits of his own route; that is, that he engages for the due delivery of the package at the place of destination, unless he expressly limits his responsibility to his own route, or the circumstances are such as to clearly indicate that that was the understanding of the contracting parties: *Weed* v. *The Schenectady and Saratoga Railroad*, 19 Wend. 534; *Muschamp* v. *The Lancaster and Preston Railway Co.*, 8 M. & W. 421; *St. John* v. *Van Santvoord*, 25 Wend

660; Id., 6 Hill 157, in error; *Wilcox* v. *Parmlee*, 3 Sandf. S. C. Rep. 610. By taking pay in advance for the whole distance, he holds himself out as a carrier for the entire distance, per WALWORTH, C., in *Van Santvoord* v. *St. John*, *supra*, where a railroad that terminated in Boston took a wagon at Troy, that was to be carried to Burlington. Hence, it is said, "It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington, or having ascertained it, to determine at his peril which of such corporations had been guilty of the negligence:" *Foy* v. *The Troy and Boston Railroad Co.*, 24 Barb. 382, and Lord ABINGER in *Muschamp* v. *The Lancaster, &c., Railway*, *supra*, remarked, that it was useful and reasonable for the benefit of the public in such a case, that it should be considered that the undertaking was to carry the parcel the whole way. "It is better," he said, "that those who undertake the carriage of parcels for their mutual benefit should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents;" all of which remarks are as applicable to the transmission of a message as to the carriage of a parcel. In this case Lecour told the defendant's clerk to send the message to California, and asked him what would be the charge of sending it to San Francisco, to which the clerk answered $21.50, which Lecour paid, and this *primâ facie* was sufficient to show that the defendants engaged to send it to San Francisco. Whatever contract was made was made with them, and not with any other company. There was nothing said, nor was there anything to indicate that they were to be answerable only for its correct transmission along their own line. They received the whole amount that was asked to send it to San Francisco, without communicating by what lines it would be sent, or any other particulars as to the mode or manner of its transmission. They took upon themselves the whole charge of sending it, and what arrangements were made, or what sum would be paid for the use of the lines in connection with them, were matters not disclosed to the party interested in the transmission of the message, and with which consequently he had nothing to do. He made his contract with them, and if injured by its non-fulfilment, he has a right to look to them for compensation for the injury sustained.

The next objection taken by the defendants is, that they entered into no contract with the plaintiff; that they made their contract with

Th. De Rutte, who sent the message, acting as the agent of Callardan & Labourdette. It does not necessarily follow that the contract is made with the person by whom, or in whose name, a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission, and where that is the case he is the one in reality with whom the contract is made. The business of transmitting messages by means of the electric telegraph is like that of common carriers in the nature of a public employment, for those who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefited by the intelligence conveyed. That becomes material only where there has been a delay or a mistake in the transmission of a message which has been productive of injury or damage to the person by whom or for whom they were employed, and to that person they are responsible, whether he was the one who sent, or the one who was to receive the message. It is somewhat analogous to the question which arises, when goods are lost upon their carriage, whether the action against the carrier is to be brought by the consignor or the consignee, and the general rule upon the subject is that the one in whom the legal right to the property is vested, is the one to bring the action, and if that is the consignee, the consignor, in making the contract with the carrier, is regarded as having acted as the agent of the other: *Danes v. Peck*, 8 T. R. 330; *Griffith* v. *Ingledew*, 6 Serg. Rawle 429; *Freeman* v. *Birch*, 1 Nev. & Man. 420; *Dutton* v. *Solomson*, 3 Bos. & Pull. 584; *Everett* v. *Salters*, 15 Wend. 474. In the case now before us it could make no difference to Callardan & Labourdette whether the message was correctly transmitted or not, as wheat could not be purchased at the time in San Francisco at the price which they had fixed, and the plaintiff was the only one who could be and who was affected injuriously by the mistake in the message. The error made led him into the purchase of over $17,000 worth of wheat, upon which he expected, upon the assumption that the despatch was correct, to make his ordinary commissions, and the purchase proving unavailable when the mis-

take was discovered, he was subjected to an actual loss of more than two thousand dollars.

Th. De Rutte may, for certain purposes, be regarded as the agent of Callardan & Labourdette in giving the order, but he was more especially the agent of the plaintiff in procuring it for him, and it is a decisive circumstance to show that he was acting for the plaintiff, and that the despatch was sent upon his account and for his benefit that Lorrimer, the correspondent in New York, was instructed by Theophilus De Rutte to charge the plaintiff with the expense of transmitting it. It was an order given to a commission merchant to purchase grain for a foreign house, if it could be bought at a certain price. In that event he had an interest to the extent of his commissions, and that he might have the earliest intelligence of it, and secure, if possible, any advantage to be derived from it, it was by the direction of his agent and correspondent at Bordeaux, and at his (the plaintiff's) expense, sent by telegraph from New York to San Francisco. When the defendants, therefore, undertook and were paid for sending the messages, their contract was with the plaintiff, through his agents, and the action for the breach of it was properly brought by him: *Dryburg* v. *The New York and Washington Telegraph Company*, 35 Penn. R. 297; *Eyre* v. *Higbee*, 15 How. 46.

But if we were to leave out of view altogether the question with whom the contract was made, the defendants would still be liable to the plaintiff for putting him to loss and damage through their negligence in transmitting to him an erroneous message, and as they were the company to whom the whole compensation for its transmission was paid, they would be liable in an action for negligence, though the error or mistake was made by one of the companies through whom they transmitted it. It has been frequently held that the owner of a vessel is liable for a collision resulting from negligence, though his vessel at the time was under the control of a pilot acting under an independent commission from the state, the reason given for which is, that it is more convenient and more conformable to the general spirit of the law, that the owner, who has had the benefit of the voyage, should seek his remedy against the pilot than that the injured party should be turned over to an action against the pilot: *Yates* v. *Brown*, 8 Pick. 23; 16 Martin's La., 4 Dall. 206; *Fletcher* v. *Broderip*, 5 B. & P. 182. And I think it may be said with equal force where a merchant in

San Francisco receives a telegraphic message from New York which leads him into a purchase involving inevitable pecuniary loss, which would not have occurred but for an error made in the transmission of the message, that he should not be compelled to seek, through a chain of telegraphic communication extending over nearly the whole length and breadth of the United States, to ascertain where the error or mistake was made, but that it is more equitable and just to hold that the telegraph company to whom the message was originally given, and to whom the whole compensation for its transmission was paid, should be answerable to him for the negligence, and that, having peculiar facilities, the obligation should be upon them to ascertain when, where, and how the error occurred, leaving them to fix the ultimate responsibility upon those to whom it belongs. "Where a trust," said Lord HOLT, "is put in one person, and another whose interest is intrusted to him is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified: *Lane* v. *Cotton*, 12 Mod. 490. A trust was reposed in the defendants that they would send the message as it was delivered to them. They determined by what companies it should be sent beyond their line, and as the result has shown, the plaintiff had an interest in its correct transmission, which is sufficient to bring the case within this rule which Lord HOLT laid down in an action on the case for negligence, and which, though expressed in a dissenting opinion, has been uniformly regarded as sound law.

The next question that arises is as to the nature and exact extent of the responsibility which the law should impose upon those who engage in the public business of transmitting intelligence from one place to another by means of the electric telegraph, whether considered with reference to their liability upon contract, or for injuries brought about by their negligence. The law upon this subject is as yet undefined, for the business is of recent origin, and the cases which have arisen are comparatively few. I have already pointed out one distinguishing feature that, though pursued for reward, it is designed for the general convenience of the public. Like the business of common carriers, the interests of the public are so largely incorporated with it that it differs from ordinary bailments, which parties are at liberty to enter into or not, as they please. In this state it is made the duty of tele

graph companies by statute to transmit despatches from and for any individuals with impartiality and good faith upon the payment of their usual charges (Laws of New York, 1848, p. 395), a duty which would arise from the nature of their business, even if there were no statute upon the subject. Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care, upon grounds of public policy, to prevent frauds or collusion with them, and because the owner, having surrendered up the possession of his property, is generally unable to show how it was lost or injured: *Riley* v. *Home*, 5 Bing. 217; *Thomas* v. *The Boston and Providence Railroad Corporation*, 10 Met. (Mass.) 476; *Coggs* v. *Bernard*, 1 Ld. Ray. 909 and App. These reasons, which are the ones usually assigned for the extraordinary responsibility of common carriers, cannot be regarded as applicable to the same extent to telegraph companies, nor are there any reasons, in my judgment, why they should be held to the extent of the responsibility of insurers for the correct transmission and delivery of intelligence. As their business, however, is one which leads to their being intrusted with confidential and valuable information, especially in commercial matters, there are opportunities for frauds and abuses, which, in view of the relation that they occupy to the public, makes it necessary upon grounds of public policy that they should be held to a more strict accountability than ordinary bailees. As the value of their service consists in the message intrusted to them being correctly and diligently transmitted, it must be taken for granted that they engage to do so, and if there is an unreasonable delay or an error committed, it should be presumed that it has arisen from their negligence, unless they can show that it occurred from causes beyond their control. It is particularly suggested by the counsel of the defendants that the telegraph is not at all times subject to the will of the operator. That although the machinery and apparatus are in complete order, yet at times a message cannot be sent because of supervening influences which at some point on the line, unknown to the operator, destroy the affinity or other active qualities of the current as it passes along the wire. The delicate touch of the battery may start the fluid which, by its passage, is to transmit the agreed sign, but before it reaches its destination a surcharged atmosphere, hundreds of miles away from the operator, may utterly destroy or materially vary the tractability of the

conductor. The fluid must thus be diffused or varied in its practical operation, without the power of man to foresee or to prevent it. Those who avail themselves of the advantage of the telegraph, can expect nothing more than it is in the power of this novel and useful invention to afford. Causes like this, or any cause equally satisfactory, would absolve a telegraph company from all responsibility for errors or delays. It is inevitable, moreover, that mistakes should be committed even by the most skilful persons in the interpreting, transmitting, and the transcribing of words, and where the liability to do so is manifest, and the risk incurred is great, it is reasonable that telegraph companies should have the right to require as a test for their own security against loss, that a message should be repeated. Their compensation is small in proportion to the risks they incur, and they have the right to qualify their liability by a special contract that they will not be answerable unless that condition is complied with. Like common carriers, they may limit their liability by a special acceptance when the message is delivered to them, but which must be brought home to the knowledge of those who employ them, who might otherwise be ignorant of the fact that a repetition of the message was necessary to insure its accurate transmission. It may be that in the course of time this practice will become so universally established among telegraph companies, that all doing business with them will be presumed to have a knowledge of it, and that the omission to secure a repetition of a message will be at the risk and peril of the party for whom it is sent.

That is not the case at present, and as there was nothing on the trial of this action to show that the clerk who delivered the message, or any one interested in it, knew of the establishment of such a regulation by the defendants, the ground of defence is not available to them.

The next ground taken is, that the plaintiff was himself at fault, in not having the message repeated, after he had ascertained that there were three errors in it. That it was co-operating negligence on his part to act upon such a message, which deprives him of all right of action. He went to the officer in San Francisco to ascertain exactly what despatch they had received, but they could not find it, and I think that the errors he had discovered were not of a character which should have led him to doubt if the words twenty-five were correct. The change from Th. to Thos. was a

very natural one. The mistake in a French word was one that might ordinarily occur, and the transformation of Monod, to the operator an unmeaning word, into monied, was one of those slips or mistakes which might readily be made. That they were so is apparent in the fact that he at once discovered them, and I think that it does not follow because he discovered mistakes like these that he was bound to regard the whole message as unreliable, and have it repeated at an expense of some fifty dollars. The words twenty-five were intelligible and plain. They expressed the very price at which wheat was then ranging in San Francisco, and it was very natural for him to suppose that they had been transmitted correctly. To hold that he was guilty of negligence because he assumed that the message was correct in this particular, would be to declare that no man must act upon one in which he discovers a few trivial mistakes, but which is otherwise perfectly intelligible, except at his peril. I do not profess to have much information upon the subject, but I apprehend that it is a matter of common and every-day experience for messages to be received with words misspelt or otherwise altered, without affecting their general sense, but with which they are perfectly intelligible, which the party receiving would have to disregard or get repeated to be made secure in acting upon them, if the courts were to recognise such a rule as the defendants insist upon.

The last question in this case relates to the measure of damages. The defendants claim that the loss which the plaintiffs sustained in consequence of this erroneous message, was not one that can be regarded as fairly within the contemplation of the parties, or such as would naturally be expected to flow from the mistake that was made.

I dissented from the judgment of my brethren in *Bryant* v. *The American Telegraph Co.*, decided at the General Term 1866, in which they held a telegraph company responsible to the amount of $10,000 for a delay in the delivery of a telegraphic despatch, by which the plaintiff lost the opportunity of securing a debt of that amount by an attachment upon property of the value, belonging to his debtor; and so far as this court is concerned, that case is decisive of the point now presented. But this is a much stronger case than that. The order, erroneously transmitted by the defendant's instrumentality to the plaintiff, was the direct cause of his purchasing the wheat at the price which he did, and

of the outlay he made for its shipment, and the inevitable loss which resulted from his acting upon the supposed order, was the natural and necessary consequence of that purchase. The familiar rule in respect to damages, is that they must be such as flow directly and naturally from the non-fulfilment of the contract; that they must not be the remote, but the proximate consequences of the breach; that they must be certain, and not speculative or contingent; and where the right of action is founded solely upon the ground of negligence, irrespective of any questions of contract, that they must be the direct and immediate consequence of the negligence committed, and this case comes fully within this rule.

The judgment should be affirmed.

Of the several points presented in the foregoing opinion, we shall notice two, as bearing more directly upon the law of telegraphs and treating the subject in a clear and forcible manner.

I. As to the nature and extent of the responsibility which the law should impose upon those who engage in the business of transmitting intelligence for the public by means of the electric telegraph.

There have been so few decisions upon this subject, and the law on the cases which have arisen, is as yet so meagre, that it is incapable of being predicated with any certainty, and in fact is only reached at all by analogy. The nature of the business differs essentially in many particulars from that of the common carrier, and although the same general rules are said to be applicable to both, they must undergo considerable modification or they fail to render impartial justice. In *Parks* v. *The Alta Cal. Co.*, 13 Cal. 422, BALDWIN, J., says: "The rules of law which govern the liabilities of telegraph companies are not new. They are old rules applied to new circumstances. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. In both cases the responsibility of the parties for breach of duties is governed by the same general rules." One of the principal reasons why telegraph companies should be held to the same responsibility attaching to other common carriers is because the public are greatly concerned in having those intrusted with duties so vitally affecting the commercial interests of a country, held to a strict accountability—and this, so far from pressing with undue severity on them and tending to restrain their formation, would undoubtedly result to their advantage, as everything which tends to lessen their responsibility weakens their position with the public, and serves to render them less frequently the means of communication for commercial transactions requiring the highest possible degree of responsibility.

It was urged, however, in the above case, and with some apparent justice, that notwithstanding all the care and attention that a company may bestow in the selection of its operators, and their undoubted competency for the position, still the telegraph is subject to influences entirely beyond their control, and not within the power of human foresight to guard against; and, therefore, telegraph companies should not be held to the same accountability as ordinary common carriers. The argument, however, fails of

force because this is the case with every carrier for hire. There are certain accidents against which he cannot guard and for which he is not, on that account, held responsible; and although, with regard to ordinary carriers, these exceptional cases may be said to be certain, and the public to know exactly what risks it must bear, still it is only because the law is definitely settled by the number of decisions upon the subject and the great length of time common carriers have been known to the law.

Would it not be better likewise, to hold telegraph companies strictly liable to the same accountability, and allow them in cases where they have failed to perform their contract, to show that it was the result of an unavoidable accident and beyond their power to prevent? In a comparatively short time the cases in which they would be held unaccountable would be as well determined as in the case of other carriers, and the reliance of the public upon their responsibility equally unimpaired.

II. As to how far the original or contracting company, where there are several connecting lines, should be held accountable for mistakes occurring on such lines, they not belonging to it nor under its control. The opinions seem to have been conflicting at different times and in different countries. The cases have not arisen in reference to telegraph companies which are of such recent date, but of ordinary common carriers, and here the same rules are undoubtedly applicable to both species of carriers, making allowance for the different causes which in either case would absolve the original company from liability.

In a case decided in England in 1841, *Muschamp* v. *The Lancaster and Preston Railway Co.*, 8 M. & W. 421, the plaintiff, a stone-mason, ordered a box of tools to be sent from Lancaster, a town on the line of the defendants' railway, to Wheatsheaf, on a connecting road. The clerk at the station said the carriage money had better be paid on delivery. The box arrived safely at Preston, the terminus of the defendants' road, but was afterwards lost, and the question was whether the defendants were liable. The Court of Exchequer held that they were. ABINGER, C. B., delivering th opinion, says, "the question is whether the following is a correct charge to a jury: Where a common carrier takes into his care a parcel directed to a particular place, and does not by *express agreement* limit his responsibility to part only of the distance, it is *primâ facie* evidence of an undertaking on his part to carry the parcel to where it is directed, although the place is beyond the limits within which he professes to carry on his business,"—*held*, that it was. He goes on to say "that the carriage-money being one undivided sum, supports the inference that although the carriers convey the parcel only a part of the distance in their own vehicles, they make subordinate contracts with other carriers and are partners *inter se* as to the carriage-money, though particular circumstances in some cases may rebut the inference which *primâ facie* must be made that defendants undertook to carry the parcel the entire distance." This case goes the full length of making the original company liable for losses occurring on connecting lines or roads, and was fully sustained in *Scothorn* v. *The South Staffordshire Railway Co.*, 8 Exch. 341, where ALDERSON, B., says "there is no doubt the defendants agreed to carry the plaintiff's goods the *whole distance* for a certain reward, and there is also no doubt they are liable for their loss through negligence during any part of the journey." The goods in this case were lost on a connecting road, after reaching the terminus of the defendants' in safety.

In both the foregoing cases the freight

was paid in one entire sum, but in *Watson* v. *The Ambergate and Boston Railway Co.*, 3 Eng. L. & E. 497, the carriage-money was only paid as far as the terminus of the defendants' road, and the rest was to be collected on delivery, yet this was held to make no difference in the rule, the contract being to carry the entire distance: Judge PATTESON saying, "the defendants not having taken the entire carriage-money is immaterial, and may be explained by their not knowing the amount."

In *Mytton* v. *Midland Railway Co.*, 4 H. & N. 614, it was held that the plaintiff could not recover damages from a *connecting railway* for a loss occurring on such connecting line, on the ground that there was one contract for an entire sum with the original company, and no contract with any of the connecting companies. To the same point are *Coxon* v. *Great Western Railway Co.*, 5 H. & N. 274, and *Blake* v. *The Same*, 7 Id. 986.

The case of *Collins* v. *The Bristol and Exeter Railway Co.*, 11 Exch. 790, may be said to have definitely settled the question in England as to the liability of the original company for all losses on connecting roads. The plaintiff, Collins, paid a certain sum to a railway company to carry goods to a place beyond the terminus of their road. In the receipt the contracting company expressly stipulated that they would not hold themselves liable for loss by fire. The goods were subsequently burnt while on a connecting road, and in a suit for damages against the connecting company, the doctrine above laid down, that the original company is the *only* contracting party, and that it is *alone* responsible for losses, was pushed to the extent of holding that the *express stipulation* of the original carrier would protect all connecting companies, although the case was one in which a common carrier was undoubtedly liable, and nothing but an express agreement could relieve him. This case was reversed in the Exchequer Chamber (1 H. & N. 516), but was sustained in the House of Lords and the judgment of the Exchequer upheld (5 H. & N. 969), the Lord Chancellor, CHELMSFORD, saying that the case was governed by *Muschamp* v. *Lancaster Railway*.

There seems to be some conflict among the decisions in the different states in this country, very few going quite the extent of the English rule, though the majority are strongly inclined that way.

In New York, in *Weed* v. *The Saratoga and Schenectady Railroad Co.*, 19 Wend. 534, the plaintiff contracted with the defendants, for the latter to convey a trunk from Saratoga to Albany, a place beyond the terminus of their route, and paid the through fare. It was held, Judge COWEN delivering the opinion of the court, that the defendants were liable without proof of the loss occurring on their road. "The defendants having undertaken to carry from Saratoga to Albany, cannot be received to say they are carriers no further than Schenectady, the terminus of their route; they are estopped to deny that they are carriers for a distance commensurate with what they engage for." This case comes fully up to the English rule laid down in *Muschamp* v. *Lancaster Railway*, cited *supra*. See also *Fairchild* v. *Slocum*, 19 Wend. 329, and *Hart* v. *Rensselaer Railroad Co.*, 4 Seld. 37. But in *St. John* v. *Van Santvoord et al.*, 25 Wend. 660, the facts were these. The plaintiff, St. John, without *any contract*, put on board defendants' boat plying between New York and Albany, a box directed "*J. Petrie, Little Falls, Herkimer Co.*," and took a receipt in that form. On the arrival of the boat at Albany, the box was placed on board of a canal-boat going to Utica, the freight to Albany being paid by the master of the canal-boat; the box was lost after leaving

Albany. It was proved on the trial that it was the custom of all boats plying on the Hudson, when they took packages from New York, directed to places west or north of Albany, to intrust them to canal-boats at Albany, to be carried to such places. Knowledge of the custom, and that the defendants' line terminated at Albany, was not brought home to the plaintiff. The Supreme Court, reversing the court below, NELSON, J., delivering the opinion, says, "the court erred in charging that custom and the usage of trade determined the rights of the parties where there was no evidence of a contract, express or implied, to carry the goods beyond Albany. Such a contract is fairly to be inferred from the receipt. The direction indicated to whom the plaintiff wished to send the box, and the defendants receiving it without any qualification and receipting for it, is, in effect, saying we will deliver it according to the direction, and so the plaintiff must undoubtedly have understood the contract." This is a just and reasonable view of the transaction, and it seems but equitable that a carrier who does not limit his responsibility, at the time of receiving a package addressed to a place beyond the terminus of his route, and who fails to notify the sender that he would only carry it a certain distance, thereby misleading him, should be held liable in case of loss; this is also in accordance with the previous decisions in this country and England.

And yet this case was reversed in the Court of Errors and Appeals, 6 Hill 157. Chancellor WALWORTH, placing the duty of notifying on the sender of the goods.—"If the owner of goods neglects to make the necessary inquiries as to the custom or usage of the carrier, or to give directions for their disposal, it is his fault, and the loss, if any, after the carrier has performed his duty according to the ordinary course of his business, must fall on the owner."

In commenting on this case in *Quimby* v. *Vanderbilt*, 3 Smith 306, DENIO, J., says, "the English rule, in my opinion, was very wisely limited in *Hart* v. *Rensselaer Railroad*, by holding that evidence was admissible to show that by the course of trade a transportation company receiving property without any *special contract*, only undertook to carry it over its own road."

In *Wilcox* v. *Parmelee*, however, 3 Sand. Ch. 610, it is expressly asserted that where the carrier *agrees* to carry the goods to a place beyond the terminus of his route, and receives compensation therefor, he is liable for a loss on a connecting road, and that the evidence of such an agreement is the giving of a receipt for such place and the collection of the freight. All doubt, however, in such a conflict of authority, was set at rest by the enactment of a statute to meet the point, at least as far as railroads are concerned, 2 R. S. § 67, 693. The language is, "whenever two or more railroads are connected together, any company owning either road and receiving freight to be transported to a place on the line of the other, *shall be liable as common carriers*, for the delivery of such freight at such place." See the last case on this subject, *Smith* v. *New York Central Railroad Co.*, 43 Barb. 225.

In Pennsylvania the rule was laid down by Judge STROUD, in the District Court of Philadelphia, *Jenneson* v. *Camden and Amboy Railroad Co.*, 4 Am. Law Reg. 234. Jenneson delivered a chest to the defendants at Burlington, N. J., to be carried to Camden, Ohio, and took a receipt in the following form. "Received from M. Jenneson, a chest marked as per margin, which we promise to deliver at our office in New York upon payment of freight." On the margin was written, "To be shipped for Camden, Ohio, from New York." The plaintiff offered to pay the freight, but defendants said it might be settled for at the end of

the line. The chest was lost, and in an action for damages, the plaintiff having declared on a contract to carry the chest from Burlington to Camden, and offering the receipt in evidence of the contract, was nonsuited on the ground of the probata and allegata not agreeing. STROUD, J., sustained the nonsuit, and in his opinion was evidently inclined to the doctrine that in the absence of a *special contract*, a carrier receiving goods directed to a place beyond the terminus of his route, would not be liable for their loss on a connecting line, and cited with marked approbation *Van Santvoord* v. *St. John*, and *Nutting* v. *Connecticut River Railroad Co.*, 1 Gray 502. In the latter case, where goods were shipped by the plaintiff from Northampton in Massachusetts to New York, over the defendants' road, which only extended part of the distance, the freight being paid *only to the terminus of the defendants' road*, in a suit for the value of the goods, which were lost on a connecting road, it is laid down by METCALFE, J., as law, "that where common carriers receive goods destined to a place beyond the terminus of their route, and take pay *only* for transportation over their own road, their obligation is simply to transport them safely to the end of their route; for if they can be held liable for a loss happening on any road but their own, we know not what would be the limit of their responsibility." He also expresses his disapproval of the doctrine of *Muschamp* v. *Lancaster Railway Co.*, *supra*.

If the learned judge only meant to say that it was capable for a common carrier receiving goods, directed to a place beyond the terminus of his route, to limit his responsibility to such route by *special agreement*, he was undoubtedly correct in the assertion, and even the English cases recognise this; but if he meant to decide that where goods are received without *any* agreement expressed, and are directed to a place beyond the terminus of a carrier's route, he is *not* liable on an *implied* agreement, evidenced from his receipt of the goods knowing them to be destined to a place beyond his road, it is the very question at issue, and the form in which it usually arises.

In *The Fitchburg & Worcester Railroad Co.* v. *Hanna*, 6 Gray 539, it was held that where several connecting railroads affirmed that they were *jointly* entitled to freight earned by bringing suit in the name of a common agent, they would be responsible for a loss, on whatever part of the line it happened, on a contract by their agent. But in *Briggs* v. *Boston & Lowell Railroad Co.*, 6 Allen 216, the court affirmed the former opinion, that a carrier was only liable as a forwarder for goods to be transported beyond the terminus of his route, after they had reached said terminus.

The rule is the same in Connecticut as in Massachusetts, that in the absence of a *special contract*, a carrier will not be liable beyond the terminus of his route, and the giving of a receipt for the whole distance, and receiving the full amount of carriage-money, will not be considered evidence of such special contract: *Hood* v. *New York & New Haven Railroad*, 22 Conn. 1; *Elsmore* v. *The Naugatuck Railroad*, 23 Conn. 457. In the last case, ELLSWORTH, J., delivering the opinion of the court, says, "We cannot think that a railroad company, simply receiving goods directed to a place beyond the terminus of their road, enter into an *implied agreement* to deliver them at such place, and we agree with the courts of Massachusetts in their dissent from the English rule of *Muschamp* v. *Lancaster Railway*."

It was intimated by Chief Justice REDFIELD, in *Sprague* v. *Smith*, that the rule as to the liability of a common

carrier, for a loss occurring on a connecting line, was different in regard to passengers and freight, and that there was no liability for the former beyond the end of the original carrier's road: 29 Vt. 421. However, in *Buntnall* v. *The Saratoga Railroad*, 32 Vt. 665, this distinction, if it existed, was not alluded to, and the broad rule was maintained that carriers were not liable for goods lost while on a connecting line. See *Quimit* v. *Henshaw*, 35 Vt. 605.

Judge DAVIS, in *Perkins* v. *Portland & Saco Railroad Co.*, 47 Me. 573, after holding that the law in this country is different from what it is in England, says, "Although without a *special contract* a carrier is not liable for a loss on a connecting line, still we think he may be bound if, by his agent, he holds himself out to the public as a common carrier to a place beyond the limits of his route; and where the agent has no express authority to make such a contract, it may be implied from a mutual arrangement for the carrying business amongst all the carriers between where the goods are received and the place of delivery." In the case in point a receipt for the whole distance was given, but no freight advanced, nor any sum agreed upon.

In *Angle & Co.* v. *The Mississippi Railroad*, 9 Iowa 487, merchandise was delivered to the defendants at Muscatine, marked "Cedar Rapids, Iowa," freight to be collected on delivery: the defendants' road only went to Iowa City, twenty-five miles from Cedar Rapids, and the rest of the distance had to be made in wagons. WOODWARD, J., says, "We are clearly of the opinion that where goods are delivered to a railroad company marked to a place beyond their road, and unaccompanied by any direction but the mark, the company is bound to deliver according to the mark, although parol evidence is admissible to vary the contract, as it is only *primâ facie* evidence from the receipt that they undertook to carry the whole distance, and the company would be exempt if an unvarying usage to deliver at the terminus of their road was proved, and knowledge of such usage brought home to the consignor."

The rule that the original carrier is liable for losses occurring beyond the terminus of his route, is the law in South Carolina (*Kyle* v. *The Laurens Railroad Co.*, 10 Richd. 382) and also in Tennessee: *Carter* v. *Peck*, 4 Sneed 203.

From the foregoing it will appear that the rule in England is undoubted to hold the contracting carrier liable for all losses occurring on any road with which he connects, and in this country that however it may vary in the different states, the current of opinion is decidedly in favor of the English rule. W. W. W.

Supreme Court of the United States.

THE CHENANGO BRIDGE COMPANY *v.* THE BINGHAMTON BRIDGE COMPANY.

A provision in an act of a state legislature incorporating a bridge company, that it shall not be lawful for any other person to build a bridge within two miles of the company's bridge, is a contract within the protection of the Constitution of the United States, and deprives any subsequent legislature of the right to authorize such bridge at any other time.

The act of the New York Legislature incorporating the Susquehanna Bridge Company (1805, ch. 89, § 38), made applicable to the Chenango Bridge Company (1808, ch. 119), and giving it all the "rights, privileges," &c., of the Delaware Bridge Company, entitles it to the benefit of a provision in favor of the latter company that no bridge should be erected within two miles of its bridge across the Delaware, so as to guarantee the Chenango Bridge Company against the erection of a bridge within the like distance of its bridge over the Chenango.

IN error to the Supreme Court of the State of New York, from a judgment entered on the *remittitur* from the Court of Appeals of said state. (27 N. Y. Reports 87.)

Henry R. Mygatt, for plaintiff in error.

Daniel S. Dickinson, for defendant in error.

The opinion of the court was delivered by

DAVIS, J.—The Constitution of the United States declares that no state shall pass any law impairing the obligation of contracts, and the 25th section of the Judiciary Act provides that the final judgment or decree of the highest court of a state, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the state, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The plaintiffs in error brought a suit in equity in the Supreme Court of New York, alleging that they were created a corporation by the legislature of that state, on the 1st of April, 1808, to erect and maintain a bridge across the Chenango river, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of

the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the state, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the 5th of April, 1855, in plain violation of the contract of the state with them, authorized the defendants to build a bridge across the Chenango river within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the state, which authorizes it, is repugnant to that provision of the Constitution of the United States, which says that no state shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the Court of Appeals, which is the highest court of law or equity of the state, in which a decision of the suit could be had. And that court held that the act by virtue of which the Binghamton bridge was built was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a state court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York. The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over state adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice MARSHALL, "that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and state courts, it was that an act of incorporation was a contract between the state and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enter-

prise is undertaken in the unshaken belief that it will never be forsaken.

A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the coun try, unhinge its business interests, and weaken if not destroy that respect which has always been felt for the judicial department of the government. An attempt even to re-affirm it could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College* v. *Woodward*, 4 Wheaton, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the chief justice, in the Dartmouth College case, that "the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. *This* will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on government to provide for them, and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: If you will embark with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and skill. Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it. It is argued, as a reason why courts should not be rigid in enforcing the contracts made by states, that

legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a state with individuals is equally protected from invasion, as a contract made between natural persons, does not awaken watchfulness and care on the part of lawmakers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and, in determining their different provisions, a liberal and fair construction will be given to the words, either singly, or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of *The Charles River Bridge*, 11 Peters, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognised that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since re-asserted the same doctrine; and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting, and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it,

and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

In 1805 the state of New York passed an act, in forty-two sections, creating five different corporations. The main purpose of the act was, at that early day, to secure for the convenience of the public, good turnpike roads; but the country was new, the undertaking hazardous, the roads crossed large and rapid streams, and the legislature, in its wisdom, thought proper to create two separate and distinct bridge incorporations, with larger powers than were conferred on the turnpike corporations.

The preamble to the thirty-second section declares the motives and purposes of the legislature. It was feared that the heavy freshets and dangerous obstructions to which the streams were subject would endanger the permanency of the bridges, and require a frequent renewal of the whole capital, and that the corporations for erecting the bridges should be relieved from the policy of reversion, which attached to the corporations for constructing the turnpike roads, and that full powers, adequate to the execution of the work in the best manner, should be assured to those citizens who would successfully accomplish the building of the bridges. It is impossible to read this recital and escape the conclusion that the legislature thought the enterprise did not promise present remuneration, and that large powers and exclusive privileges must be given to get the stock taken and the bridges built. It is evident that what was then considered a great scheme of internal improvement was in the minds of the legislature. Such a scheme was, at that early period in the history of the state, not of easy solution. It required more energy and foresight, and involved greater hazard, in the commencement of this century, to build turnpike roads through an unbroken wilderness, and erect bridges over dangerous streams, than it would *now* to checker the surface of a state with railways. These considerations are great helps in arriving at a correct knowledge of the intention of the legislature and in giving a proper construction to the grants that were made. For it should never be lost sight of that the main canon of interpretation of a contract is to ascertain what the parties themselves meant and understood. In order to connect the turnpike roads, it was neces-

sary to cross the east and west branches of the Delaware, the Susquehanna, and Chenango rivers. These streams were all in the same category. The work of improvement was incomplete until each was spanned with substantial bridges; and there is nothing to show that the dangers apprehended, and which formed the inducements to the grant of large powers, did not apply to all of them alike. Fifteen sections of the act are devoted to the creation of the Delaware Bridge Company, for the purpose of erecting bridges over the east and west branches of the Delaware river, with the usual faculties, powers, and incidents of a corporation, and subject to the usual duties, regulations, restraints, and penalties. The duration of the company was limited to thirty years, and competing bridges or ferries, within the prescribed limits of two miles above and below, were forbidden. These were important privileges, and justified by the peculiar circumstances of the country; and it is easy to see that without them prudent men would not have engaged in the enterprise. The Delaware Bridge Company having been constituted with great minuteness of detail, a few words and a single section sufficed to bring into existence the Susquehanna Bridge Company. The thirty-eighth section of the act created the latter corporation, to erect and maintain toll-bridges across the Susquehanna and Chenango rivers at certain localities, and further declared that the "Susquehanna Bridge Company be, and hereby are, invested with all and singular the powers, rights, privileges, immunities, and advantages, and shall be subject to all the duties, regulations, restraints, and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the *provisions*, *sections*, and *clauses* thereof not *inconsistent* with the particular provisions therein contained, shall be, and hereby are, fully extended to the president and directors of this corporation."

No one can read the entire act through and fail to perceive that the legislature *intended* to create two bridge corporations, exactly similar in all material respects. Protection was alike necessary to both; the public wants required both; the scheme of improvement embraced both; the danger of present loss applied to both; and there were the same motives to give valuable franchises to both.

The inquiry, then, is, has the legislature used language that

clearly conveys that intention? and on this point we entertain no doubt.

It is not questioned that the provision limiting the Delaware charter to thirty years, was carried into the Susquehanna charter: but it is denied that the prohibition against competition was also imported.

The clause in the Delaware charter on that subject is in the following words: "that it shall not be lawful for any person, or persons, to erect any bridge, or establish any ferry, across the said west and east branches of the Delaware river, within two miles, either above or below the bridges to be erected and maintained in pursuance of this act." This was, undoubtedly, a covenant with the Delaware Company that they should be free from competition within the prescribed limits. It is argued, because the east and west branches of the Delaware are named, that the prohibition was not intended to reach the Susquehanna Company. But this construction is narrow and technical, and would defeat the very end the legislature had in view. It is true, there were certain minor provisions in the Delaware charter, which were peculiar to it, and of course it would be absurd to suppose that they were transferred, or intended to be transferred to the Susquehanna Company, but by the terms of the law whatever provisions were applicable, were extended to the latter company. It easy to see that the legislature never meant that the judges of Delaware county, who were to visit and inspect the Delaware bridges, should also visit and inspect the Susquehanna, because there were similar officers in Tioga county where the Susquehanna bridges were located. But the privilege against competition was *applicable* to both corporations, and, in the unsettled state of the country, necessary to the existence of both, for the legislature well knew, that it would be madness for adventurers to build toll-bridges in a new country, where travel was limited and settlers few, if the right was retained to authorize other adventurers, to build other bridges so near as to divide even that limited travel. The form adopted in making the grants has weight, in arriving at the true legislative intention, and it is worthy of consideration, that it is not unusual in the legislation of this country, to grant vast powers in a short act, by referring to, and adopting the provisions of other corporations of like purposes. In fact, some of the great enterprises of the day have sprung into existence, and dis-

tributed their blessings, by virtue of legislation similar to that which created the Susquehanna Bridge Company. The object is apparent, not to encumber the statute book by useless repetition and unnecessary verbiage. The legislature of New York, at great length, and with commendable care and circumspection, incorporated the Delaware Company, and then to avoid repetition, gave to the Susquehanna Company all the rights and advantages, which in the same act were conferred on the Delaware corpo ration. *This was enough*, but in fear of cavil, and to avoid any misconstruction, and out of superabundant caution, it was declared that all the provisions, sections, and clauses in the Delaware charter, not *inconsistent* with the particular provisions of the Susquehanna charter, should be fully extended to the president and directors of the latter corporation. There were no inconsistencies between the two corporations, except such as would arise from difference in *locality*, and in every other respect the corporations were alike. Each was to bridge two streams, and each needed and did receive the fostering care of the legislature. When it is conceded, as it must be, that a franchise which prohibits competition is an advantage, and that it was enjoyed by the Delaware Company, and that there is nothing in the peculiar provisions of the Susquehanna charter which prevents that company from enjoying it, then it is conferred, and there is an end to controversy.

The history of the subsequent legislation of the state, on the subject of these bridges, is explanatory of the intention of the legislature of 1805, and confirmatory of the view already taken. In 1808, the Susquehanna and Chenango bridges were not built, and longer time and greater privileges were required to insure the success of that enterprise. The legislature in fear that the scheme of internal improvement, which was not complete without the bridges, would fail, furnished still greater inducements to the parties proposing to erect them. The thirty years' limitation was repealed, and the charter made perpetual, and the time limited for building the bridges was extended four years. And these provisions of the Susquehanna charter, which were thus altered and treated by the legislature of 1808 as belonging to it, were, if part of it, imported from the Delaware charter. Can it be supposed for one moment, that when the Susquehanna Company was demanding higher privileges in order to *live*, that it was the inten-

tion of the legislature to deprive it of the right to shut out competition, with which the Delaware Company was invested, and which was nearly as valuable as the right to take tolls.

The intention of the legislature was manifest, to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware Company that were applicable to it and consistent with the different locality it occupied; and the language used, in our opinion, gives effect to that intention; and the two-mile restriction is as much a part of the charter of the Susquehanna Company as if it had been directly inserted in it. It is argued that the restriction cannot apply to the Chenango bridge, because it is located less than two miles from the confluence of the Chenango river with the Susquehanna. But the restriction is for two miles, either above or below the bridges, and is applicable to a bridge built above, and within the prohibitory limits, although a question might arise whether it was extended to a bridge which was built below the junction of the streams. The Susquehanna Company, by the original charter, were to erect bridges over both the Susquehanna and Chenango rivers; but, with the amendments which were made in 1808, it was declared to exist for the sole purpose of building and maintaining a bridge over the Susquehanna, while at the same time the privilege of bridging the Chenango was given to "The Chenango Bridge Company," a new corporation, created with the same faculties and franchises, and subject to the same duties and restrictions as the Susquehanna corporation. The construction which has been given to the Susquehanna charter is, necessarily, a solution of all questions pertaining to the charter of the Chenango Bridge Company. The legislature, therefore, contracted with this company, if they would build and maintain a safe and suitable bridge across the Chenango river at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge or establish any ferry within a distance of two miles on the Chenango river, either above or below their bridge. Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances.

No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge and is become a thing of public interest and use; and every ferry ought to be under a public regulation:" Harg. L. T., ch. ii. 16; 17 Conn. 63; 20 Johns. 100; 2 McLean 383.

As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature.

The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," *is*, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango Bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

The decree of the Court of Appeals of New York is reversed, and a mandate is ordered to issue, with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

NELSON, J., did not sit in the argument of this cause, on account of sickness.

GRIER, J., dissenting.—I feel constrained to dissent from the opinion of the majority of my brethren, which has just been read. The general principles of law, as connected with the question involved in the case, are, no doubt, correctly stated, as to the strict construction of statutes as against corporations claiming

rights so injurious to the public. But my objection is, that they have not been properly applied to the case before us.

The power of one legislature to bind themselves and their posterity, and all future legislatures, from authorizing a bridge absolutely required for public use, might well be denied by the courts of New York; and as a construction of their own constitution, we would have no right to sit in error upon their judgment. But assuming such a power for one legislature to restrain the power of future legislatures, those who assert that it has been exercised must prove their assertion beyond a doubt. Such intention must be clearly expressed in the letter of the statute, and not left to be discovered by astute construction and logical inferences. Although an act of incorporation may be called a contract, the rules of construction applied to it are admitted to be the reverse of those applied to other contracts. Yet the opinion of the court, while admitting the rule of construction, proceeds on a contrary hypothesis, and with great ingenuity, and astute reasoning, has given a construction most favorable to the monopolist, and injurious to the people.

To regard the general language of this act of incorporation as first bringing from the *east* and *west* branches of the Delaware to the Susquehanna company, a provision as to what it should not be lawful for any person or persons to do, and then as bringing it from the Susquehanna company, and incorporating in the charter of the Chenango Bridge Company a clause that "it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the '*west*' and '*east*' branches of the Delaware river, within two miles, either above or *below* the bridge," and make it read so as to apply to the Chenango river, with a single stream two miles above, and one-fourth of a mile (its entire extent) below, and then apply to the Susquehanna for one mile and three-fourths further down, and, at the same time, get rid of the thirty years' limitation in the Delaware charter, is, I think, going an unusual and irrational stretch beyond all ordinary rules of construction in such cases.

It seems to me that the fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction of the act in question, is, itself, conclusive evidence that such construction should not be given to it.

CHASE, C. J., and FIELD, J., concurred.

Supreme Court of Pennsylvania.

THE COMMONWEALTH OF PENNSYLVANIA *v.* JOSEPH C. STRODE, EXECUTOR OF CALEB STRODE, DECEASED.

United States stocks and bonds are subject to a state collateral inheritance tax, like other property in similar circumstances.

The opinion of the court was delivered by

WOODWARD, C. J.—The single question is whether our collateral inheritance tax is applicable to that part of the decedent's estate which consisted of bonds of the United States, that were by law exempted from state taxation. And the opinion of the learned judge below is so satisfactory, as to leave very little for us to add.

The mistake of the learned counsel for the plaintiff in error consists, we conceive, in treating this as a tax of the government bonds, when it is really a tax upon a decedent's estate dying without lineal heirs. And it does not help the argument that the bulk of the estate is made up of these bonds, for that estate passed into the hands of the executor for administration, and is taxed in his hands *as an estate*. The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees, and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. One of the legal obligations to which every estate that is to go to collateral kindred is subject, is this five per cent. duty to the commonwealth. And it is not until this work of administration is performed, that the right of succession attaches. The distributees may indeed consent to accept certain goods and chattels in specie without conversion, as is frequently done in settlement of estates; but such arrangements nowise affect the theory of the law, that the estate is first to be administered and then enjoyed.

Now this five per cent. tax is one of the conditions of administration, and to deny the right of the state to impose it is to deny the right of the state to regulate the administration of decedents' goods. If an estate consist wholly of federal bonds and is indebted, conversion of them into money is necessary to pay the debts, and nobody would doubt that the sum that remained after payment of debts would be subject to a deduction of five per cent. for the use

of the state. But suppose the federal bonds be used to pay the only indebtedness that exists, and a residue of estate remains for distributees, is it not to pay the collateral inheritance tax? Clearly it must, though it may be less than the aggregate of the bonds. This act operates on the *residue* of the estate after paying debts and charges, and theoretically that residue is always a balance in money. The administration account always exhibits a balance in cash, not in specific goods, whether bonds or horses; and though an heir may take bonds or horses as cash, the account must show, and always does show, a cash balance. That is the fund taxed by this law, and not the bonds or other chattels which may have produced the fund. Therefore, neither the prohibitory clause of the Act of Congress of 1862, nor any of the principles of decision against state authority to tax that which federal authority has exempted from taxation, has any application here. The federal government has not prohibited the states from prescribing rules of inheritance and succession to estates of decedents, and it would be grievous mistake of legislation and judicial authority to apply it with such effect.

The judgment is affirmed.

READ, J., dissenting.—The United States bonds which in this case are sought to be subjected to the collateral inheritance tax, were issued under the second section of the Act of Congress of the 25th February 1862, 12 Stat. at L. 345, which provides, that "all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under state authority." These words are perfectly clear, and no doubt has been expressed but that this provision is constitutional.

By the Act relating to collateral inheritances, passed the 7th April 1826, and its supplements, which are to be found in Brightly's Purdon under that title, page 148, &c., the legislature of Pennsylvania, before these bonds were in existence, imposed a tax or duty for the use of the commonwealth, of $5 on each and every $100 of the clear value of all estates, real, personal, and mixed, passing from any person who may die seised or possessed of such estate being within this commonwealth, either by will or under the Intestate Laws, or any part of such estate or estates or interest therein, to any person or persons other than to or for the use of

father, mother, husband, wife, children, and lineal descendants. The words "being within the commonwealth" extend to all persons domiciled within this commonwealth at the time of their decease, as well as to estates; and persons having their domiciles in another state, territory, or country, and dying leaving real or personal estates within this commonwealth, the same shall be subject to the payment of the collateral inheritance tax. In order to fix the valuation, a fair and conscionable appraisement of the personal estate of the decedent is to be made by an appraiser appointed by the register of wills, which appraisement is final and conclusive against the commonwealth: Commonwealth *v.* Freedley's Executors, 9 Harris 33. The tax is to be a lien on the property or estate chargeable with it, and the executors and administrators are also made liable for it. These are the provisions applicable to the case before us, and it will be recollected that in all these laws, nine in number, it is uniformly called a tax.

If, therefore, the state had subsequently created a new species of security, and declared that it should be exempt from taxation, it is clear that it would be exempted from the collateral inheritance tax. When, therefore, Congress by its paramount authority created these securities, and declared that they should "be exempt from taxation by or under state authority," the same result must follow.

The collateral inheritance tax is a direct, positive act and exercise of the state taxing power, which is expressly prohibited from reaching these bonds by the congressional declaration of exemption from state taxation of any kind whatever. The tax is a tax only, and cannot be attributed to a supposed despotic power of taking every man's property when he dies, to be exercised by the legislature. I have never heard that the Commonwealth of Pennsylvania claimed the right to confiscate the whole or any part of a man's estate, simply because he was domiciled and died within our borders. It is only a tax laid by the taxing power, and if so, this decision should be reversed.

Court of Common Pleas of Philadelphia.

TAYLOR v. WINTERS.

No new tenancy is created by a mere agreement for an increase of rent in the middle of the year of the tenancy. The term stands unchanged, by a promise to pay for a balance of a term, more rent than a tenant is required to pay by the contract under which he entered into possession.

Such promise, unless supported by a good consideration, is a *nudum pactum*, and cannot be enforced.

Opinion by ALLISON, P. J.

The judgment of the alderman is based on a clear mistake of the legal effect of a promise made by a tenant during the term to pay an increased rent for premises which he holds as lessee of his landlord. The time originally agreed upon for the term to end, is not shifted or varied by such promise. A modification of a contract of letting, in the single particular of the amount of rent to be paid, does not vary or alter the terms or conditions of the renting as to the time when the term is to begin or end. The agreement remains in all other respects as it was entered into between the lessor and lessee, and such a change is not in law or in fact an abandonment by either of the parties of any other right or duty which one could claim for himself and against the other, under the terms of the original contract.

Why should it be otherwise? The term for which a lessee is entitled to hold demised premises is not dependent upon the *amount* of rent which he is required to pay to his landlord; whether the rent to be paid be more or less, it is of no consequence; that which is essential is, that a consideration should be paid for the use and enjoyment of the property rented by the lessee from the lessor. But if the rent to be paid be a penny, it will as well support the relation of landlord and tenant, and is in law as good a consideration, as if the agreement be to pay $1000 or more. It therefore follows, that the term for which premises were rented, is not a condition or covenant dependent upon the *quantum* of rent which the tenant has promised to pay and the lessor has agreed to accept; but that it may be shifted up or down during the term by the consent of the parties to the contract, without changing the term as first established between them. And of so little value is a mere promise made during a term by a tenant to

give more, or of a landlord to take less rent for an unexpired portion of a term, that unless it be supported by a consideration good in law, it is of no value, it is a mere *nudum pactum*, which could not be enforced. If, however, such promise be properly supported, like any other agreement good in law, it would bind the parties as to that upon which it was intended to operate, and no further. The remaining portions of the contract would stand unaffected by an alteration of the amount of rent to be paid. That which the parties for a sufficient consideration had agreed to change, would be changed, that which the new agreement did not cover would remain. A landlord and tenant may, by mutual consent, alter an agreement in part or in whole, but because they agree to alter it in one particular, it does not follow as a legal consequence that it is to be departed from in any other respect.

This point does not seem to have been adjudicated in Pennsylvania, nor have I been able to find a case anywhere, in which the question has been directly presented for decision. Woodfall on L. & T. 158, 266, 5th London edition, asserts the proposition that no new tenancy is created by a mere agreement for an increase of rent in the middle of a year of the tenancy, and cites *Bedford* v. *Kendrick*, Adams's Ejectment 144, but this case in Adams is stated to have been decided at Warwick Summer Assizes 1810, and is annotated as a MS. case merely, but upon the strength of *Bedford* v. *Kendrick*, and the doctrine as it is found in Woodfall, Adams also asserts the principle to be, that although no new tenancy is created by a mere agreement for an increase of rent in the middle of a year of a tenancy, yet a notice to quit after the receipt of increased rent must expire at the time when the tenant originally entered.

Upon principle, however, without the aid of adjudicated cases, we hold that the alderman erred in supposing that the promise of the defendant, made before his term was ended, to pay an increased rate of rent, which, by the contract under which he went into possession, he was not required to pay, terminated his tenancy at the time at which the increase was to begin, and that a new year then started to run; and as upon this mistake he rested his judgment, it must be reversed.